

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT GREENEVILLE

ANTONIO HERRERA,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos. 2:10-CR-110-RLJ-2
	)	2:16-CV-190-RLJ
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

**MEMORANDUM OPINION**

Before the Court is Petitioner's pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Doc. 1227]. He bases his request for collateral relief on *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), was unconstitutionally vague [*Id.*]. The United States responded in opposition to collateral relief on July 29, 2016 [Doc. 1241]. For the reasons below, the petition will be **DENIED** and **DISMISSED WITH PREJUDICE**.

**I. BACKGROUND**

In 2011, Petitioner pled guilty, pursuant to a written plea agreement, to conspiring to distribute and possess with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(A); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) [Presentence Investigation Report (PSR) ¶¶ 2–3, 9–35]. The Court sentenced Petitioner to an aggregate term of 211 months' imprisonment: 151 months for the drug offense, at the bottom of the applicable Guideline range, followed by the consecutive statutory mandatory minimum of 60 months for the firearms offense [Doc. 832]. Consistent with the appeal-waiver provision in his plea agreement, Petitioner did not appeal.

## II. STANDARD OF REVIEW

To obtain relief under 28 U.S.C. § 2255, Petitioner must demonstrate “(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law . . . so fundamental as to render the entire proceeding invalid.” *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (quoting *Mallett v. United States*, 334 F.3d 491, 496–97 (6th Cir. 2003)). He “must clear a significantly higher hurdle than would exist on direct appeal” and establish a “fundamental defect in the proceedings which necessarily results in a complete miscarriage of justice or an egregious error violative of due process.” *Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998).

## III. ANALYSIS

Petitioner argues that the *Johnson* decision invalidated the residual clause in § 924(c)(3)(B)’s definition of crime of violence and that the absence of that provision requires vacatur of his conviction under § 924(c)(1)(A) [Doc. 1227 (“Since 18 U.S.C. § 1203 is not categorically a crime of violence, the § 924(c)(1)(A)(i) enhancement is invalid in this [c]ase.”)]. The argument fails for three reasons.

First, the crime that Petitioner possessed a firearm in furtherance of for purposes of § 924(c) was conspiracy to distribute at least five kilograms of cocaine, not a violation of the statute which he argues is no longer a crime of violence—18 U.S.C. § 1203.

Second, binding Sixth Circuit precedent holds that while *Johnson* invalidated the residual provision of the ACCA, § 924(c)(3)(B)’s definition of crime of violence remains unaffected.<sup>1</sup> *See*

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<sup>1</sup> The ACCA mandates a 15-year sentence for any felon who unlawfully possesses a firearm after having sustained three prior convictions “for a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). The statute defines “violent felony” as “any crime punishable by imprisonment for a term exceeding one

*United States v. Taylor*, 814 F.3d 340, 376–79 (6th Cir. 2016) (recognizing at least four “significant differences” between the residual clause in § 924(c)(3)(B) and the ACCA’s residual clause and noting “the argument that *Johnson* effectively invalidated [the former] is . . . without merit”).

Third, even if *Johnson*’s reasoning could be used to invalidate § 924(c)(3)(B)’s residual clause, Petitioner’s conviction under § 924(c)(1)(A) did not rely on that provision. To the contrary, Petitioner was convicted of possessing a firearm in furtherance of a drug trafficking crime, not crime of violence [Doc. 832]. The statute defines “drug trafficking crime” as “any felony punishable under the Controlled Substances Act, 21 U.S.C. §§ 801, et seq., [or] the Controlled Substances Import and Export Act, 21 U.S.C. §§ 951, et seq.” 18 U.S.C. § 924(c)(2). The *Johnson* decision has no bearing whatsoever on the scope of that definition. *Accord United States v. Jenkins*, 613 F. App’x 754, 755 (10th Cir. 2015) (deeming *Johnson* irrelevant to drug offenses). As such, Petitioner has failed identify a viable basis for vacating his § 924(c) conviction.

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year” that (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another” (the “use-of-physical-force clause”); (2) “is burglary, arson, or extortion, involves the use of explosives” (the “enumerated-offense clause”); or (3) “otherwise involves conduct that presents a serious potential risk of physical injury to another” (the “residual clause”). 18 U.S.C. § 924(e)(2)(B). It was this third clause—the residual clause—that the Supreme Court deemed unconstitutional in *Johnson*. 135 S. Ct. at 2563.

Section 924(c)(1)(A) makes it a crime for an individual, “in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, [to] use[,] carr[y] [or possess] a firearm . . . in furtherance of . . . such crime.” 18 U.S.C. § 924(c)(1)(A). Section 924(c)(3) goes on to define “crime of violence” as any “felony” that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another” (use-of-physical-force clause); or “by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense” (“residual clause”).

#### IV. CONCLUSION

For the reasons discussed, Petitioner's § 2255 motion [Doc. 1227] will be **DENIED** and **DISMISSED WITH PREJUDICE**. The Court will **CERTIFY** any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this Court will **DENY** Petitioner leave to proceed *in forma pauperis* on appeal. See Rule 24 of the Federal Rules of Appellate Procedure. Petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. § 2253; Rule 22(b) of the Federal Rules of Appellate Procedure.

**IT IS SO ORDERED.**

ENTER:

s/ Leon Jordan  
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United States District Judge